No. 210 24

# Supreme Court of the United States

OCTOBER TERM—1943

HARRY M. KOHN,

Petitioner,

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

SYDNEY J. SCHWARTZ,
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# Supreme Court of the United States

OCTOBER TERM—1943

HARRY M. KOHN,

Petitioner,

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

## PETITION FOR CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the petitioner, Harry M. Kohn, and respectfully petitions this Court for a writ of certiorari to review the final judgment of the Court of Appeals of the State of New York entered in this matter on April 6, 1944 (R. 246) (292 N. Y. 597). The said judgment affirmed, without opinion, a judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered in the office of the Clerk of said Court on November 19, 1943 (R. 242). The Appellate Division judgment, in turn, modified, without opinion, by remitting the fine imposed, and as so modified, affirmed a final judgment of the Court of Special Sessions of the City of New York, County of New York, entered on May 27th, 1943 in the office of the Clerk of said Court (R. 20) convicting the petitioner of the crime of sending annoying letters under Section 551 of the Penal Law of

New York State. Prosecution was by information filed by the District Attorney of New York County (R. 4). Petitioner was sentenced to six months imprisonment and to the payment of a fine of $500 (R. 20).

## Summary and Short Statement of the Matter Involved

Section 551 of the Penal Law of the State of New York makes it a misdemeanor, among other things, to send or deliver or for such purpose to part with the possession of any letter, postal card or writing, with or without a name subscribed thereto, or signed with a fictitious name, "with intent thereby to cause annoyance to any person."

The petitioner is a licensed private detective (R. 34) engaged in the business of locating missing debtors for lawyers, finance companies, department stores and other clients (R. 26, 154, 235). The information charges that the defendant sent and delivered and, for such purpose, parted with the possession of six cards and a letter with intent thereby to cause annoyance to various people named in the information (R. 4, *et seq.*). Each epistle forms the basis for a separate count of the seven counts of the information. Each of the documents was sent or caused to be sent by petitioner as a decoy card or letter, for the purpose of having the recipient call petitioner by telephone and engage in conversation with petitioner, in order to enable petitioner to ascertain the address or whereabouts of various missing debtors that he was trying to locate (R. 31, 91, 155).

Petitioner was tried before a Court consisting of three justices, without a jury (R. 21). He was acquitted on the first count based upon a letter (R. 4-6) and on three counts based upon cards (R. 7, 13, 17). He was convicted upon three counts based upon substantially identical cards (R. 9, 11, 15), one conviction being by a divided

bench (R. 20). The letter and cards upon which the various counts of the information were based were forms so designed as to convey the impression that they came from a sanitarium or convalescent home. Typical of the cards is that contained in the sixth count of the information, one of those upon which the defendant was convicted (R. 15). It is reproduced as follows:

OUT-PATIENT DIVISION

OFFICE OF WARD SUPERVISOR

FOR OFFICIAL USE ONLY

FOR IDENTIFICATION REFER TO WARD

KE-88-4

**IMPORTANT**

PLEASE PHONE CH 4-0169 AT 1-2 P.M.

IMMEDIATELY UPON RECEIPT OF THIS CARD. (EXCEPT SATURDAY, SUNDAY OR HOLIDAYS)

ASK FOR WARD SUPERVISOR

To_____

WE ARE REQUIRED TO WITHHOLD IDENTITY OF PATIENT AND INSTITUTION UNTIL VERIFIED CONTACT IS MADE WITH PERSON ADDRESSED.

VISITING HOURS BY APPOINTMENT ONLY.

DO NOT PHONE SATURDAY, SUNDAY OR HOLIDAYS.

APPROVED BY Mild Winch

Director

The cards forming the basis for the other counts vary only in that some (not all) have the names of addresses (R. 7, 9, 11, 13, 17). There was no proof at the trial that the petitioner knew any of the persons to whom the cards were mailed, that he had any personal aminus towards any of those individuals, or that he had any malicious or wilful intent to cause wanton annoyance. The only proof of petitioner's purpose was that the cards were sent in the course of his business as a private detective locating missing debtors and that he did not

deviate from that purpose at any time (R. 112-5, 124, 142, 181-2). There was no different evidence of *intent to annoy* in sending the group of cards in respect of which petitioner was convicted from that relating to the documents forming the basis for the counts upon which he was acquitted. There was variation in the evidence of the subjective reaction of the recipients of the cards. Some were disturbed (R. 124-5, 141-2, 180) and others paid little attention to the documents (R. 119, 159, 164-5). All of the evidence of subjective reaction was objected to by petitioner at the trial (R. 122, 141, 166, 180-1).

Petitioner contends that the statute upon which he was convicted is unconstitutional, and that the conviction deprived him of property and liberty without due process of law, for the reason that the statute, upon its face and particularly in its application to petitioner in the case at bar, is so vague and indefinite that ordinary persons cannot know what standard of conduct is expected of them, in order to avoid the commission of a crime under the statute. In the case at bar, for doing precisely the same thing on seven separate occasions, petitioner has been found guilty of crime in three instances (one by a divided Court) and was found not guilty in four cases. The proof is undisputed that his purpose and intent never varied. The cards themselves are substantially identical. The only variation in the evidence was the subjective reaction of the persons who received the cards.

Petitioner further contends that the statute is unconstitutional because, as construed in this case, it attempts to legislate the creation of a new crime in a realm of conduct not within the scope of the police powers of the States. The act proscribed by the statute involves no injury or threat of injury to person or property; it does not contemplate any obscenity, defamation, threat to public morals or other type of conduct within the commonly accepted scope of police power. The statute as construed

attempts to legislate good manners or taste involving no public interest. While petitioner happens to be a private detective, the statute is not directed to control of the activity of his calling,* but governs the conduct of every person in the state, without limitation or distinction.

## Jurisdiction

Jurisdiction to grant the writ prayed for by petitioner is found in Section 237 (a) of the Judicial Code (Act of Febraary 13, 1925, Chapter 229, 43 Stat. 936, 937). There is drawn in question the validity of a statute of the State of New York, to wit Section 551 of the Penal Law, on the ground of its being repugnant to the constitution of the United States, and the decision of the Court of Appeals of the State of New York, which is the highest Court of said State in which a decision in the suit could be had, is in favor of its validity. The question involved is substantial, inasmuch as petitioner was convicted of the commission of a crime. The issue involved has not been directly considered in any previous case in this Court. Other cases in this Court hereinafter referred to lead to the conclusion that the decision of the Court of Appeals is not in accord with general principles laid down by decisions of this Court.

The federal question raised in this matter and sought to be presented to this Court for review was first raised by motions to dismiss at the trial (R. 195-9, 206) which were denied (R. 205-6) and by notice of appeal to the Appellate Division (R. 2) and to the Court of Appeals (R. 241) both of which Courts affirmed the conviction (R. 242, 246).

The practice in the State of New York does not require the specification or assignment of error upon the taking

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*Private detectives were not subject to license in 1891 when the Part of Section 551 of the Penal Law here involved (Laws of 1891 c.120, § 1) was first enacted. (Laws of 1898 c.422; New York General Business Law, § 70).

of an appeal, and the notice of appeal brings up for review all questions presented by the record (Code of Criminal Procedure, §§ 522, 523). The question was directly presented to the Court of Appeals by argument to that Court in the brief submitted on behalf of petitioner, reading in part as follows:

"Unless the statute is reasonably construed so as to exclude from its ambit the necessary and incidental annoyances in the carrying on of a lawful business and those inherent in the multitude of other lawful pursuits incident to civilization, it would clearly be unconstitutional.

*United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 89;
*Stromberg* v. *California*, 283 U. S. 359;
*New State Ice Co.* v. *Liebmann*, 250 U. S. 262, 279-280;
*Herndon* v. *Lowry*, 301 U. S. 242;
*Lanzetta* v. *New Jersey*, 306 U. S. 451;
*Thornhill* v. *Alabama*, 310 U. S. 88, 97-8;
*Gorin* v. *United States*, 312 U. S. 19, 26-7, n. 12.

"The same would be true if the test of what constitutes annoyance is the subjective reaction of the recipients of the cards (the test applied by the trial court, fols. 301, 517, 618-9, 644-7).

"In *Lanzetta* v. *New Jersey*, *supra*, the Court stated, at page 453:

> 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in Connally v. General Construction Co., 269 U. S. 385, 391: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its pen-

alties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'"

"In *Stromberg* v. *California*, *supra*, the Court had under consideration a statute of California making it a felony publicly to display any flag 'as a sign, symbol or emblem of opposition to organized government * * *.' The Court stated (p. 369) that the wording of the statute might be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations. It held that a statute so vague that it could be construed to include acts inherently lawful was violative of the Fourteenth Amendment and void.

"The Court there reversed a conviction under the statute notwithstanding that there was evidence in the case which might have justified a conviction under other portions of the statute not unconstitutional where the ac- cused, however, had been tried upon an indictment pleading the faulty as well as the valid parts of the statute.

"In *Smith* v. *Cahoon*, 283 U. S. 553, the Court stated (p. 564) that obligations imposed by criminal statutes must be defined with a 'fair degree of certainty'.

"In *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, the Court held unconstitutional a criminal statute construed to define real value as 'its market value under fair competition, and under normal market conditions' because the definition offered 'no standard of conduct that it is possible to know' (p. 221).

"In *Gorin* v. *United States*, *supra*, Mr. Justice Reed stated (p. 26): 'If this were the language, it would need to be tested by the inquiry as to whether it had double meaning or forced any one, at his peril, to speculate as

to whether certain actions violated the statute. This Court has frequently held criminal laws deemed to violate these tests invalid.'

"We do not cite these authorities to show that the statute in all its applications is unconstitutional. We contend that a construction which makes the test of intent to annoy the subjective reaction of the recipients of the cards destroys the degree of definiteness required of criminal statutes by the Federal Constitution.

"Section 551 of the Penal Law, as applied in the case at bar, has been given a subjective definition. Defendant's intent in mailing the cards has been ignored. He has been acquitted on four counts where there was no proof of annoyance, and he has been convicted on three counts where the Trial Court felt there was subjective annoyance notwithstanding that the cards were all identical, the surrounding circumstances were the same, and defendant's purpose and intent never varied."

If it be contended that the issue was not sufficiently clearly stated at the trial, the issue was nonetheless preserved for review by this Court.

Petitioner at the trial contended for a construction of the statute which would have excluded his conduct, as alleged in the information, from the scope of the law (R. 195-7). In doing so he was justified because the only two cases then reported which considered the statute suggested this position (*People* v. *Mikulski*, 146 N. Y. Supp. 829; *People* v. *Loveless*, 84 N. Y. Supp. 1114; neither officially reported). Having timely raised the federal question so that it was submitted to and necessarily considered by the Court of Appeals, jurisdiction to review by certiorari has been preserved in this Court. (*Missouri* v. *Gehner*, 281 U. S. 313, 320; *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 678; see also dissenting opinion of Mr. Justice Cardozo in *Herndon* v. *Georgia*, 295 U. S. 441, 446-7, concurred in by Mr. Justice Brandeis and present Chief Justice Stone).

## The Questions Presented

The record presents the following federal questions:—

1. Is Section 551 of the Penal Law, on its face and in its application to petitioner, unconstitutional and void as violative of the Fourteenth Amendment to the Constitution of the United States, in that it prescribes no standard of conduct to which petitioner might refer in determining whether his act in sending or causing to be sent the documents specified in the information were or were not prohibited by the statute?

2. Is Section 551 of the Penal Law, on its face and in its application to the petitioner in the case at bar, unconstitutional and void as violative of the Fourteenth Amendment to the Constitution of the United States, in that it proscribes conduct not within the proper exercise of the police powers of the State, to wit conduct consisting at worst of no more than bad taste or manners.

## Reasons Relied on for the Allowance of a Writ

The reasons relied on for the allowance of a writ for certiorari herein prayed for is that the Court of Appeals of the State of New York, by its judgment sought to be reviewed, has decided a federal question of substance not heretofore determined by this Court and has decided it in a way not in accord with applicable decisions of this Court in other cases involving a similar principle.

As appears more particularly in the brief submitted herewith, this Court has repeatedly held that criminal statutes violate the Fourteenth Amendment of the United States Constitution where they prohibit conduct for which no standard is prescribed which may be reasonably determined and ascertained in advance of acting. The statute involved in the case at bar does not furnish a sufficiently ascertainable standard of guilt. Petitioner was engaged in the pursuit of a lawful occupation carry-

ing it on in a way that he had been following for years. The nature of his occupation, to wit, the detection of persons intent upon concealing their identity and whereabouts, made it necessary for him, in accordance with time-honored practice, to use methods of decoy to aid him in detection. Although the defendant did precisely the same thing on seven occasions revealed by the information, the identical act has been found to be non-criminal and lawful in four instances and has been found to violate the statute in three cases, and in one of the latter, the Court itself could not agree unanimously upon the culpability of petitioner's conduct. Obviously, if identical conduct can constitute crime one day and be lawful the next, it is not possible for an individual to know in advance what is prohibited by the statute. Particularly is this true in the case at bar where petitioner's activities were made known to the District Attorney of New York County over four years prior to the filing of any information and the greatest degree of cooperation was offered to submit petitioner's business methods to investigation (R. 234-5, 28).

The statute, on its face, proscribes conduct of the widest possible character. Hardly a human activity exists which does not occasion or cause annoyance to some one. The statute does not limit its scope to conduct which threatens injury to person, property, or public morals. No threat of injury is necessary to constitute the crime. Under the circumstances here involved and further discussed in the brief appended hereto, it is submitted that the statute goes beyond the scope of the police powers of the state and attempts to legislate in matters of taste and manners where no reasonably ascertainable standard exists or can exist in our society.

The issue involved is one of fundamental and basic importance, since the statute of New York is the only one in any of the States which attempts to castigate as criminal conduct which threatens no injury to person,

property or morals, involves no obscenity or defamation and involves in its scope nothing more than good manners. If this first attempt to control personal conduct having no proper public interest can succeed, the way will be open for legislation of the widest scope controlling every intimate detail of private life regardless of whether any public interest is threatened or involved. Under these circumstances, it seems that this case presents a question of the greatest importance which ought to be reviewed by this Court.

## Conclusion

Wherefore, petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York, commanding that Court to certify and to send to this Court on a designated day for its review and determination a full and complete transcript of the record and all proceedings in the action entitled: People of the State of New York, respondent, v. Harry M. Kohn, defendant-appellant, calendar #26, February, 1944 Term, and that said judgment of the Court of Appeals of the State of New York, the said judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department and the said judgment of conviction of the Court of Special Sessions of the City of New York, New York County, may be reversed by this Honorable Court, and that petitioner may be acquitted of the charges contained in the information, and have such other and further relief as in the premises may seem meet and proper.

Dated, New York City, June 29, 1944.

HARRY M. KOHN,
Petitioner.

By SYDNEY J. SCHWARTZ,
Counsel.